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ASUS COMPUTER INTERNATIONAL,  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and  
ASUSTEK COMPUTER INCORPORATED,

Plaintiffs,

vs.

INTERDIGITAL, INC.; INTERDIGITAL  
COMMUNICATIONS, INC.; INTERDIGITAL  
TECHNOLOGY CORPORATION; IPR  
LICENSING, INC. and INTERDIGITAL  
PATENT HOLDING, INC.,

Defendants.

Case No. 15-cv-01716-BLF

**ASUS'S UPDATE RE: MOTION TO  
STRIKE PORTIONS OF EXPERT  
REPORTS**

Hearing Date: January 17, 2019  
Time: 9:00 a.m.  
Location: Courtroom 3, 5th Floor  
Judge: Hon. Beth Labson Freeman

1 Pursuant to the Court's Orders on August 6 and 31, 2018 (ECF Nos. 226, 255), Plaintiffs  
2 ("ASUS") provide this update to their Motion to Strike Portions of Expert Reports or, in the  
3 Alternative, to Supplement Fact and Expert Discovery ("Motion"), filed August 2, 2018 (ECF No.  
4 220). The Court referred ASUS's alternative request to supplement fact and expert discovery to  
5 Magistrate Judge Cousins, while retaining jurisdiction over any issues that remained after he ruled  
6 on the alternative relief. (ECF No. 226.) Magistrate Judge Cousins granted ASUS leave to  
7 supplement expert reports but denied supplemental fact discovery (document production and  
8 depositions). (ECF No. 247.) The portion of ASUS's Motion relating to InterDigital's "unwilling  
9 licensee" defense has been resolved by agreement between the parties. There remains one issue for  
10 the Court to decide, namely whether to strike the references to a pair of documents produced after  
11 the close of fact discovery in two expert reports served by Defendants ("InterDigital").

12 The remaining issue in this Motion presents a simple and straightforward question: whether a  
13 party's experts should be permitted to rely on significant new documents the party injected into the  
14 case after the fact discovery cutoff date. The simple and straightforward answer is no. Courts  
15 routinely preclude parties from relying on documents they introduced after the fact discovery cutoff,  
16 including where the party did not create the documents until after the cutoff. *See, e.g., Jones v.*  
17 *Travelers Cas. Ins. Co. of Am.*, 304 F.R.D. 677, 678, 683 (N.D. Cal. 2015); *see also TCL Commc'n*  
18 *Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. SACV1400341JVSANX, 2016 WL  
19 6921126, at \*3 (C.D. Cal. May 24, 2016) (rejecting producing party's attempt to rely on new alleged  
20 FRAND offer made two months *before* the fact discovery cutoff).

21 The documents at issue are InterDigital's license offer letter and corresponding internal  
22 financial model dated April 12, 2018. InterDigital's counsel represented to Magistrate Judge Cousins  
23 that it intends these documents to be an important part of its case. (ECF No. 242, audio file at 7:36-  
24 7:39.) By creating and producing the documents after fact discovery ended and during the expert  
25 discovery period, InterDigital alters the case's foundation, when it is too late for ASUS to take the  
26 discovery it is entitled to. InterDigital chose to introduce these documents into the litigation record  
27 nearly a month after the March 16 fact discovery cutoff, and it has done nothing to justify the  
28 untimeliness of these documents. *See* ECF No. 142 (setting fact discovery cutoff date). It was

1 entirely within InterDigital's capabilities to craft this offer letter and model while fact discovery was  
2 ongoing, if it wanted to make them a part of this case. Whether InterDigital's motive was to shield  
3 itself from discovery, to drag out negotiations while it continues to collect royalties, or both,  
4 InterDigital's strategic delay should not be rewarded.

5 Expert discovery is supposed to be conducted on a "locked-in ... factual record" for which  
6 the parties have had the opportunity to "test the factual basis[.]" *See Apple, Inc. v. Samsung Elecs.*  
7 *Co.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at \*5 (N.D. Cal. Aug. 2, 2012). ASUS has not had  
8 the opportunity to "test the factual basis" of this important portion of InterDigital's case. Had the  
9 documents been produced on time, ASUS could have asked InterDigital fact witnesses about them  
10 during their depositions. Instead, ASUS will now be surprised by what the fact witnesses say about  
11 these documents at trial. Especially now that ASUS's request to take follow-up fact discovery has  
12 been denied (ECF No. 247), striking the late-produced documents and the experts' reliance on them  
13 is a matter of fundamental fairness and orderly trial preparation. The parties may continue their  
14 negotiations toward a possible resolution of their dispute, but the negotiations over which this case  
15 will be litigated need a reasonable end point, which the fact discovery cutoff provides.

16 To be clear, ASUS does not believe InterDigital's new documents cure, or even mitigate, its  
17 ongoing breach of contract and other violations. But they do affect the arguments about how those  
18 violations occurred. Even with a chance to supplement expert reports, ASUS never got the  
19 opportunity to cover these documents in its fact depositions, interrogatories, or follow-up document  
20 requests. Moreover, allowing the documents in would reward InterDigital's selective application and  
21 waiver of privilege. *See* Motion at 6-7 (ECF No. 220); Joint Statement Re: Plaintiffs' Motion for  
22 Leave to Supplement Fact and Expert Discovery at 1-3 (ECF No. 237). InterDigital's tactic of  
23 withholding models and deposition answers about them as privileged, then producing a selected one  
24 tailored to the case it wants to present after there is no longer an opportunity to depose witnesses on  
25 it, deprives ASUS of a fair opportunity to fully litigate the issues raised by the documents.

26 For the reasons stated above and in the Motion, ASUS respectfully requests that the Court  
27 strike opinions connected to the letter and licensing model produced after the close of fact discovery.  
28 *See* Motion at 3:21-24, 3:27-28 (listing the portions of reports ASUS seeks to strike).

DATED: October 1, 2018

By: /s/ Michael R. Franzinger

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